

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 79-553

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PARK WEST MANAGEMENT CORP.,

*Petitioner,*

—against—

ARTHUR and BESS MITCHELL, et al.,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF NEW YORK

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**PETITIONER'S REPLY MEMORANDUM**

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Respondents, in their opposing brief in No. 79-553, fail to challenge the basic premise of the petition to the effect that there has been an unconstitutional impairment of petitioner's contractual rights which would justify this Court to take jurisdiction based upon *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) and *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1 (1977).

Instead, several arguments are made which, upon analysis, are revealed to be without substance.

A. Respondents, relying upon *Cross Lake Shooting and Fishing Club v. State of Louisiana*, 224 U.S. 632 (1912), essentially argue that "it is not clear that the New York Court of Appeals construed the subject statute (R.P.L.

§235-b) retroactively", and, if this be so, the decision does "not give rise to a Federal question" because "the Contract Clause of the Federal Constitution is not directed against all impairment of contract obligations, but only as against such as results from a subsequent exertion of the Legislative power of the State." (Brief in Opp., pp. 7-9).

Even a cursory reading of the Court of Appeals' opinion (Petitioner's Exh. A) indicates that it is entirely devoted to a discussion of section 235-b and its specific application to the facts of the instant case. The Court of Appeals mentions only in passing (albeit erroneously) that the statute is a codification of prior case law. Thus, there is no factual support in the record for respondents' contention that there was no impairment of petitioner's contractual rights by exercise of the legislative power of the state. Moreover, respondents' reliance upon *Cross Lake Shooting and Fishing Club v. State of Louisiana*, 224 U.S. 632 (1912), is misplaced since that case dealt only with the question of the effect upon the contract of a prior defect in title. This Court, in dismissing the writ, held that the case presented no question under the Contract Clause but went on to observe (224 U.S. at 638-639) :

"But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of a contract, what obligations arose from it, and whether they are impaired by the subsequent law."

Thus, the factual circumstances of the instant case precisely meet the jurisdictional elements set forth by this Court in *Cross Lake*. Here, the impairment of petitioner's contractual rights indeed arose from the Court of Appeals'

interpretation and application of section 235-b i.e., an "exertion of the legislative power of the state."

B. Respondents assert that petitioner's contractual rights were not unconstitutionally impaired since section 235-b affected merely a "remedy" and not an "obligation" of the contract (Brief in Opp., pp. 9-10).

This attempted distinction overlooks the fact that the *force majeure* clause (Petitioner's Exh. F) in the lease dealt directly with an essential obligation of the lease contract itself and provided, *inter alia*, that, where a breach occurred by reason of "strike or other labor trouble, Act of God or of the public enemy . . .", the landlord was not responsible. Since this term of the parties' agreement went to the very essence of their bargain it is an unjustified distortion of the facts to assert that the effect of section 235-b was merely to create a "remedy" and not an impairment of the contract itself. Respondents, by truncated quotations, attempt to analogize the effect of section 235-b to the situation presented in *Funkhouser v. J.B. Preston Co., Inc.*, 290 U.S. 163 (1933), where a statutory enactment permitted the addition of legal interest to a verdict resulting from an action brought for breach of contact. It is apparent, however, that *Funkhouser*, and the other cases proffered by respondents (Brief in Opp., pp. 9-10) are clearly inapposite.

C. Respondents assert that section 235-b is a police power statute and as such may impair existing contractual rights (Brief in Opp., pp. 10-12).

As stated and analyzed in petitioner's main brief (pp. 12-19), the State pursuant to its police power may, indeed, under proper circumstances, impair the obligations of contract where such impairment is necessary to effectuate the nature and purpose of legitimate state legislation. However, the inquiry in each case becomes a search for the

"limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police-power" (*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 [1978]). In the instant case, where the impairment involves contractual expectations already fixed (i.e. section 235-b invaded the lease obligations retroactively) and it is not essential to the purpose of the statute, it passes the limits upon the power of the State to act.

### CONCLUSION

Here, the Court of Appeals' construction and application of section 235-b unconstitutionally impairs petitioner's contractual rights in violation of the Contract Clause of the Constitution.

For all of the foregoing reasons, a writ of certiorari should issue to review the opinion and order of the New York Court of Appeals.

Dated: New York, New York  
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Respectfully submitted,

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